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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. ~~964~~ 103

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
TRUCK DRIVERS LOCAL UNION No. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. L.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR LINEN AND CREDIT EXCHANGE, OMAHA-COUNCIL BLUFFS BAKERY EMPLOYERS LABOR COUNCIL, BAY AREA COUNCIL OF BAKERY OPERATORS, BOSTON BAKERY EMPLOYERS LABOR COUNCIL, CHICAGO BAKERY EMPLOYERS LABOR COUNCIL, SEATTLE BAKERS' BUREAU, BAKERS OF WASHINGTON, INC., NEW YORK CITY BAKERY EMPLOYERS LABOR COUNCIL, FEDERATED EMPLOYERS OF NEVADA, INC., GREATER NEW YORK AND NORTHERN NEW JERSEY MILK DEALERS' LABOR COMMITTEE, SAN FRANCISCO RETAILERS COUNCIL, AS AMICI CURIAE, IN SUPPORT OF PETITION

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Pursuant to written consents of the parties, which have been filed with the Clerk of this Court in accordance with Rule 42(1), the above-named multi-employer associations

respectfully submit this brief as *amici curiae* in support of the petition for a writ of certiorari herein.

INTEREST OF AMICI CURIAE

The first named *amicus curiae,* the Linen and Credit Exchange (hereinafter referred to as the "Exchange"), is involved directly in this case. It is a local multi-employer association for the Buffalo metropolitan area which for thirteen years has negotiated on behalf of its members collective bargaining agreements with unions representing their employees. The other *amici curiae* are similar multi-employer bargaining associations which for many years have negotiated for their members in various cities or metropolitan areas throughout the United States.

In the instant case the union involved, Truck Drivers Local Union No. 449, was an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL and had been negotiating with the Exchange. While the union was continuing to bargain collectively with the Exchange it called a strike against one of the Exchange's members in support of its demands against all of them. Ultimately an agreement between the Exchange, on behalf of all of its members, and the union on matters covered by the bargaining was reached. When the strike at the plant of a single member was called, the other members of the Exchange as a defense against the economic results of this action temporarily laid off their employees. The National Labor Relations Board found this course legal and proper. *Buffalo Linen Supply Company,* 109 NLRB 447 (1954). However, the Court of Appeals for the Second Circuit held that this lay-off was improper.*

*See Petition, p. 2-8, for statement of facts.

The Exchange is aggrieved by the decision of the Court of Appeals since the finding of an unfair labor practice may subject some of its members to liability for back pay for the period of the temporary lay-off. Furthermore, the other *amici,* as well as the Exchange, fear that the decision below, in permitting the union to disregard the employers' association and in denying the right to a temporary defensive lay-off, will destroy the multi-employer bargaining concept which has operated to the advantage of employee, union, employer and the public, and will confuse and jeopardize the settlement of labor disputes in their respective localities.

ARGUMENT

POINT I

THE WRIT SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS BELOW HAS RENDERED A DECISION IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME MATTER.

The decision of the Court below is in direct conflict with the decisions of the Courts of Appeals for the Seventh, Eighth and Ninth Circuits on the same question. *Morand Bros. Beverage Co.* v. *National Labor Rel. Bd.,* 7 Cir., 190 F. 2d 576 (1951), 204 F. 2d 529 (1953), *cert. den.* 346 U. S. 909 (1953); *Leonard* v. *National Labor Relations Board,* 9 Cir., 197 F. 2d 435 (1952), 205 F. 2d 355 (1953); *National Labor Rel. Bd.* v. *Spalding Avery Lumber Co.,* 8 Cir., 220 F. 2d 673 (1955); *National Labor Relations Bd.* v. *Continental Baking Co.,* 8 Cir., 221 F. 2d 427 (1955).

Unanimous courts in the *Leonard, Spalding Avery* and *Continental Baking* cases, *supra,* held that where a union struck one or some members of an employers' association,

the use of a temporary lay-off by the other members as a defense to such a strike, under circumstances similar to those of the instant case, did not violate the Labor Management Relations Act, 1947 (61 Stat. 136, ch. 120, 29 U. S. C. Supp. III, § 141). In the *Continental Baking* case, in fact, the Court specifically followed the decision of the National Labor Relations Board which was reversed in the instant case. *Buffalo Linen Supply Company,* 109 NLRB 447 (1954).

In the *Morand* case, the unanimous Court, although it ultimately held that a permanent discharge of employees was unlawful, clearly decided that when the union struck one member of an employer association the Act permitted a temporary lay-off as the employers' means of exerting economic pressure on the union and as a corollary of the union's right to strike.

The Court of Appeals below, in reversing the Board, recognized the conflict between the Ninth Circuit and itself when it stated, "In the instant case, the Board departed from its previous position by adopting the position of the Ninth Circuit in Leonard v. N. L. R. B. * * *" (231 F. 2d 110, 113).

In summary, twelve Court of Appeals judges who considered the question, including Judge Waterman who dissented in the instant case, have adopted a view contrary to that of the two judges who constituted the majority in the Court below.

These conflicting determinations of an important question arising under the same federal statute create an atmosphere of doubt and confusion jeopardizing relationships among millions of workers and thousands of employers. The matter can be clarified only by a decision of this Court.

POINT II

THE QUESTION CONCERNING THE RIGHT OF MEMBERS OF AN ESTABLISHED MULTI-EMPLOYER ASSOCIATION TO LAY OFF EMPLOYEES TEMPORARILY UNDER CIRCUMSTANCES SIMILAR TO THOSE IN THE INSTANT CASE, FOLLOWING A STRIKE AT THE PLANT OF ONE EMPLOYER MEMBER, IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

Employer members of multi-employer associations would, under the decision of the Court below, be deprived of their right to act together in resisting a strike at the plant of one of the members of the association. Thus, that decision threatens the survival of the whole concept of multi-employer bargaining and, as a consequence, jeopardizes the principle of equality of bargaining position, which is so fundamental to the labor law.

A. The Nature and Extent of Multi-Employer Bargaining

Multi-employer bargaining groups have existed since as early as the 1880's, and their growth has closely paralleled the growth of union strength. A most significant expansion of these groups came in the 1930's when labor emerged as a major force under the impetus of the Wagner Act. *Collective Bargaining with Associations and Groups of Employers*, 1947, *B. L. S. Bulletin No. 897*, p. 1; Carpenter, *Employers' Associations and Collective Bargaining in New York City* (1950) p. 28-9; Freidin, *The Taft-Hartley Act and Multi-Employer Bargaining* (U. of Pa. Press, 1948) p. 4-5; Pierson, *Multi-Employer Bargaining: Nature and Scope* (U. of Pa. Press, 1948) p. 17, 35-6.

By 1953 there were as many as 5,000,000 employees involved in multi-employer bargaining, over one-half of whom bargained at the local level with about 5,000 local or city employer associations throughout the country.* *Collective Bargaining Structures: The Employer Bargaining Unit*, 1953, *B. L. S. Report No. 1*, p. 2, 8-11; *B. L. S. Bulletin No. 897, supra*, p. 13; Backman, *Multi-Employer Bargaining* (N. Y. U. Inst. of Labor Relations and Social Security, 1951), p. 10; Taft, *Economics and Problems of Labor* (1949), p. 609; Jones, *The NLRB and the Multi-employer Unit*, 5 Labor Law Journal 34 (Jan. 1954); Pierson, *op. cit. supra*, p. 48-51.

In 1951, 40% or more of the employee members of each of 59 unions, including such unions as the Teamsters and the Bakery and Confectionery Workers' International Union of America, were represented in bargaining of the multi-employer type. Many other large unions had from 80% to 100% of their members so represented. *B. L. S. Report No. 1, supra*, p. 10-11; *Directory of National and International Labor Unions in the United States, 1955, B. L. S. Bulletin 1185*, p. 27, 28, 31, 32, 41.

The technique of local multi-employer bargaining is not rigid in form. In general, employers in a particular industry in a local area form an association, such as the Exchange in this case, for the purpose of collective bargaining with unions. Such bargaining associations represent their respective members in negotiations and in drafting contracts

*If the coal and railroad industry, which accounts for 90% of the total bargaining at a national level, is disregarded, it will be perceived that local area multi-employer bargaining is by far the most significant type and that national bargaining, with the exceptions noted, is relatively infrequent. Backman, *Multi-Employer Bargaining* (N. Y. U. Inst. of Labor Relations and Social Security, 1951), p. 10.

which become binding on all members, sometimes upon acceptance by a majority. The multi-employer group also frequently undertakes the task of administering the contract. *B. L. S. Report No. 1, supra,* p. 1-2; Carpenter, *op. cit. supra,* p. 292 *et seq.*, 373.

Multi-employer bargaining is utilized particularly in such local industries as personal services, baking, printing, clothing, textiles, trucking and warehousing, hotel and restaurant, dairy products, construction, retailing and beverages. These and other such industries are usually characterized by numerous small and moderately sized employers selling in local product markets. Such local industries engaged in multi-employer bargaining have enjoyed relative labor peace in recent years. Manifestly, many unions favor the multi-employer procedure. *B. L. S. Bulletin No. 897, supra,* pp. 3, 12-3; *B. L. S. Report No. 1, supra,* p. 8; Pierson, *op. cit. supra,* p. 34, p. 34 fn 3; Backman, *op. cit. supra,* p. 8, 9, 16, 34, 43, 46; Burke, *Negotiating Problems of the Building Industry,* Kaplan, *Negotiating Problems of the Trucking Industry,* Proceedings of the Conference on Industry-Wide Collective Bargaining (U. of Pa. Press, 1949) p. 75, 81, 84, 87; Carpenter, *op. cit. supra,* p. 2-5, 66, 368-9; Taft, *op. cit. supra,* p. 614.

The widespread utilization of multi-employer bargaining, as described above, illustrates the fact that the decision of the court below and any decision which this Court might render on review, will have a vital impact not only on the interests of these *amici* and their employees, but also upon the entire fabric of collective bargaining, particularly at the local level, throughout the United States.

B. The Multi-Employer Group is Vital to Equality at the Bargaining Table and Affords Other Advantages to Both Parties

We submit that the decision of the Court of Appeals for the Second Circuit is contrary to the intention of Congress, which, in enacting the Labor Management Relations Act, 1947, sought to equalize bargaining power. As stated in the Senate Report on this legislation *(Senate Miscellaneous Reports, Federal Labor Relations Act of 1947,* 80th Cong., 1st Sess., Vol. I, Report 105, Part 1, p. 2):

> "The committee bill is predicated upon our belief that a fair and equitable labor policy can best be achieved by equalizing existing laws in a manner which will encourage free collective bargaining."

The "Short Title and Declaration of Policy" in the Labor Management Relations Act, 1947, and the "Findings and Policies" inserted in Section 1 of the National Labor Relations Act, as amended, also express fully the intent of Congress to equalize collective bargaining (61 Stat. 136, 29 U. S. C. Supp. III, §§ 141, 151).

Multi-employer bargaining assures a measure of equality in bargaining position between labor and management, thus contributing to the fulfillment of the basic aim of the labor law. Carpenter, *op. cit. supra,* p. 8, 365-9; Pierson, *op. cit. supra,* p. 17-8; Jones, *op. cit. supra,* p. 34; Zorn, *Multi-Plant and Multi-Employer Bargaining,* N. Y. U. Sixth Annual Conference on Labor (1953) p. 401; Newman, *Union Responsibilities (Including Suits Against Unions),* N. Y. U. Seventh Annual Conference on Labor (1954) p. 312-3; *Senate Miscellaneous Reports, Federal Labor Relations Act of 1947,* 80th Cong., 1st Sess., Vol. I, Report 105, Part 2, p. 7.

Another real advantage of group bargaining is that it gives the small employer a voice, which he would otherwise not have, in the negotiation of labor contracts. All too often the alternative to multi-employer bargaining is not single employer bargaining but "pattern bargaining" or presentation of form contracts on a "take it or leave it" basis. As Professor Carpenter, *op. cit. supra,* p. 12—after an exhaustive analysis of bargaining in New York City—said, single-shop bargaining is a "myth".

In the absence of association bargaining, the union may single out a particularly vulnerable employer and obtain from him the terms it desires and then attempt to impose those terms on other employers in the area, one by one, without bona fide collective bargaining with those employers, or the union may ignore any meaningful bargaining and present each employer with a pre-prepared agreement. Kaplan, *Negotiating Problems of the Trucking Industry,* Burke, *Negotiating Problems of the Building Industry,* Witte, *An Institutional Approach,* Proceedings of the Conference on Industry-Wide Collective Bargaining (U. of Pa. Press, 1949) p. 21, 28, 33, 74, 75-6, 81, 87; Jones, *op. cit. supra,* p. 45, fn. 90; Carpenter, *op. cit. supra,* p. 10-14; Somers, *The Multi-Employer Proposals and the Coal Operators,* 6 Labor Law Journal 296, 310 (May 1955); Backman, *op. cit. supra,* p. 9, 13-14; Lester, in *Hearings Before Joint Committee on Labor-Management Relations,* 80th Cong., 2nd Sess., *On the Operation of the Labor-Management Relations Act* (1948), Part 2, p. 912.

David Kaplan, when chief economist for the Teamsters, stated the issue forcefully in *Negotiating Problems of the Trucking Industry, supra,* before the Conference on Industry-Wide Collective Bargaining (at p. 87):

> "* * * if the employers really want any representation in collective bargaining, they have to get that participation through some group. Otherwise, we would have to make the contract with those employers who could get together as a group and then we would have no other alternative but to impose that same contract on everyone else.
>
> "So I think that in the type of industries that I am discussing now [*e.g.*, local trucking industry]—it isn't a question of this or that type of bargaining—but it is merely a question of multi-employer bargaining, or no bargaining at all."

There can, therefore, be no equality and consequently no real bargaining on any basis other than a group basis where a local industry is composed of a substantial number of relatively small and moderately sized employers or employer establishments.

Multi-employer bargaining has many other advantages. For example, union bargaining with a local employers unit is practical. It facilitates negotiation and administration, reduces the expense of bargaining, minimizes union raiding, makes available to both sides the talents of more experienced personnel and establishes uniform principles applicable to all members of the group. Carpenter, *op. cit. supra,* p. 12-13, 48-9, 61; Jones, *op. cit. supra,* p. 34; Somers, *op. cit. supra,* p. 310; Kaplan, *op. cit. supra,* p. 87; *Senate Miscellaneous Reports, supra,* p. 7.

Stabilization of wages and standardization of working conditions, which are among the primary aims of the labor movement, are promoted by local group bargaining. Such bargaining has been a major factor in the elimination of sweat shop conditions and competitive wage cutting in periods of slump. Witte, *op. cit. supra,* p. 28; Freidin,

op. cit. supra, p. 5, fn. 5, 13-4; *In the Matter of Admiar Rubber Company,* 9 NLRB 407, 415-6 (1938); *Brunswig Drug Company,* 71 NLRB 309, 312 (1946); Burke, *op. cit. supra,* p. 75; Carpenter, *op. cit. supra,* p. 51-2, 243-4, 368-9; Newman, *op. cit. supra,* p. 312-3; Jones, *op cit. supra,* p. 34.

C. The Decision of the Court Below Threatens the Continued Existence of Local Multi-Employer Bargaining

Multi-employer groups function only for the purpose of collective bargaining and the administration of the resulting labor contract. There is no other reason for their existence. A strike against one member of a group is in reality a strike against all, and a temporary lay-off as a defense to such a strike is the group's only adequate remedy. Unless the employers can function as a group, the very reason for the group vanishes. The principle of equality at the bargaining table likewise is sacrificed with the dissolution of the group.

We respectfully submit that approval should not be granted to restrictions having the effect of eradicating multi-employer bargaining, a concept widely praised, particularly at the local level, by representatives of labor, students of the subject and industrial leaders alike.*

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*E. g., Carpenter, *op. cit. supra,* p. 366-9; Jones, *op. cit. supra,* p. 45-6; Pierson, *op. cit. supra,* p. 33-6; Bahrs, *The San Francisco Employers' Council* (U. of Pa. Press, 1948); Burke, *op. cit. supra,* p. 74; Kaplan, *op. cit. supra,* p. 81; Witte, *op. cit. supra,* p. 21; Freidin, *op. cit. supra,* p. 5; Backman, *op. cit. supra,* p. 9; *House Hearings, Education & Labor Committee,* 83rd Cong., 1st Sess. (1953), *Matters Relating to The Labor-Management Relations Act of 1947,* Part 3, p. 1024, Part 4, p. 1177, 1180, Part 7, p. 2450-3; Zorn, *op. cit. supra,* p. 401; Newman, *op. cit. supra,* p. 312-3; *Senate Miscellaneous Reports, supra,* p. 6-7; *Hearings Before Joint Committee on Labor-Management Relations,* 80th Cong., 2nd Sess., *On the Operation of the Labor-Management Relations Act* (1948), Part 2, p. 912-14.

We therefore respectfully submit that because of (1) the established legality in the 7th, 8th and 9th Circuits of a temporary lay-off such as that employed by the members of the Exchange in this case, (2) the importance of local multi-employer bargaining in the national economy and (3) the compelling need for an authoritative interpretation of the Act by the Supreme Court, both to clarify the chaotic situation created by the conflict of the Circuits and to settle the rights and privileges of the parties in this important area of labor relations, the decision of the Court of Appeals for the Second Circuit should be reviewed.

CONCLUSION

For the foregoing reasons, the writ prayed for should be granted.

Dated: May 23, 1956.

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